

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 775 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE N.J.PANDYA and

MR.JUSTICE R.BALIA.

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

VIJAY KRISHNARAV

Versus

STATE OF GUJARAT

Appearance:

MR AR THACKER for Petitioner

MR AJ DESAI, ASST. PUBLIC PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE N.J.PANDYA and
MR.JUSTICE R.BALIA.

Date of decision: 26/09/96

ORAL JUDGEMENT

(per N.J.Pandya, J)

1. The appellant is the accused of Sessions Case No.

54 of 1992 tried by the learned Additional Sessions Judge, Surat for offence under Section 20(b) of NDPS Act. By the order dated 29.7.1992, the learned Judge held the accused guilty and awarded ten years rigorous imprisonment and fine of Rs.1.00 lakh and in default to undergo six months simple imprisonment.

2. Learned Advocate Shri A.R.Thacker appearing for the appellant has strongly relied on the statutory safeguard given to the accused under the said Act as per the provision of Section 50 and according to him this requirement has not been complied with. He placed reliance on decision of Supreme Court in State of Punjab vs. Balvirsingh (1994 SC 1872) wherein compliance with provision of Section 50 were held to be a mandatory. The learned Additional Public Prosecutor Mr. A.J.Desai has brought to our notice a decision of Division Bench of this Court where the view taken is that if the officer who carries out the search is himself a gazetted officer, provisions of Section 50 are not attracted. Reliance was also placed on Dhanpal Singh Baru Singh Thakkar & Sons vs. State of Gujarat, 1996 (2) GLH 94.

3. Mr.A.R. Thakkar however urges that Section 50 by itself makes no distinction in procedure to be followed on the ground of search officer being gazetted officer or non-gazetted officer. He urged to distinguish the two cases on the grounds that the two decisions are founded on the premise that officers authorised to detain and search a person or building or conveyance under Section 41 are different from officers authorised under Section 42. Officers not below the rank of peon can be so authorised under either of the two provisions. Principally authorisation under two provisions differ in the extent of empowerment. While officers authorised under Section 41 whether by Metropolitan Magistrate or Magistrate by issue of a warrant or by Central Government or State Government or by subordinate officers by Gazetted Officers of the Department concerned so authorised by appropriate Government are empowered to detain a person and carry out search whether by day or night, such authorisation, whether of gazetted officer or non-gazetted officer not below the rank of a peon empowers him to detain a person and carry out search of such person or building or conveyance only between sunrise and sunset. In the latter case viz., an officer authorised under Section 42 is under further restraint to exercise power of search between sunset and sunrise only after recording his grounds for holding a belief that search warrant or authorisation cannot be obtained without affording opportunity of concealment of evidence

or facility of escape of the offender. He also urges that the two decisions relied on by learned A.P.P. appears to have been rendered without bringing to the notice of the court decisions of Supreme Court in (1) Syed Mohd. Syed Umar Saiyed & ors. vs. State of Gujarat (1995) 3 SCC 610; (2) State of Himachal Pradesh vs. Prithvi Chand (1996) 2 SCC 37; and also that the court had no occasion to consider two later decisions of the Supreme Court in State of Punjab vs. Labh Singh JT 1996 (6) 598 and Raghbir Singh vs. State of Haryana 1996 Cr.L.J. 266 emphasising that a search officer is under obligation to make the apprehended person aware of his right to be searched by nearest gazetted officer or Magistrate, who must necessarily be an officer other than apprehending officer delineating the basic safeguard against a planted or planned recovery of offending articles, which gives rise to presumption of guilt of the person who is found to be possessed of contraband article to be rebutted by accused, by the apprehending officer himself being a search officer irrespective of his rank, thus, ensuring and assuring genuine recoveries before an officer of gazetted status of judicial officer who must be other than the apprehending officer.

Though prima facie, we are of the opinion that the contentions require a deeper consideration, as far as facts of present case are concerned, this need not detain us, inasmuch as, we find that the factum of search by which officer search has been actually carried out in fact is itself open to serious doubt.

4. From the facts as revealed from the record, we find that Customs Officer Mr. Pastagia received telephonic information and in company of his colleague Mr. V.R.Desai, he proceeded with the probable site where the accused was likely to come with contraband. This happens to be a locality known as Vadi Falia Bus Stand in the city of Surat. They caught hold of the man with a packet, jacked him in the seat in jeep car and brought him to the customs office. Thereafter the proceedings are taken over by Mr.Savalia who also happens to be another Superintendent of Customs.

5. Mr. Savalia in his deposition States that at 5.00 p.m. a person was directed to him by V.R.Desai. He was holding a packet in his hand and he was told that it contains charas.

One fails to understand , if the accused was not searched beforehand by someone how he could be directed to superior officer with information about packet of

charas in his hand, obviously, he appears to have been searched for the suspicious article by someone before he was directed to Mr. Savalia. Mr. Desai who is alleged to have directed the accused to Mr. Savalia for further proceedings has not been examined. We are left to guess who, if at all, was the first person to search the accused, and what was found on the person of the accused. This is apart from the fact that accused holding out in hand contraband article as exhibit to be surrendered appears to be quite unnatural to be believed. At any rate it creates a serious doubt about the manner of search of article professed by witness. Unless the recovery from the person of the accused in the manner projected is beyond reasonable doubt, there cannot be occasion to hold that since search was made by a gazetted officer, compliance with Section 50 was not required. For taking off the safeguard provided under Section 50, before raising presumption of guilt against accused, it must be established beyond reasonable doubt that search was carried out by the gazetted officer.

Mr. Pastagia, P.W.1, who is also a Superintendent of Customs states that he received an information about a person from Rajasthan with a kilogram charas is coming to Surat for selling it there and place where he was to come was also informed. He along with another gazetted officer V.R.Desai and other staff members reached near Bus Stand and there they apprehended the accused put him in the jeep and delivered him to along with 'Muddamal', this statement read as a whole reveals that no attempt was made to search accused or to find out whether he is carrying any article or not, he is categorical that before handing over of person to Mr. Savalia, he did not open the packet to confirm whether it is charas or not. He is also categorical that packet was in a bag in the hand of the person, and before handing over to Mr. Savalia, no search of bag was made to find out as to what it contained. Then how it could he could state that charas pacaket ws in the bag that was held by the accused in his hand.

This statement suggests that Mr. Pastagia was leading the party which apprehended the accused. It did not even looked in the bag which was in the hand of the accused. And no investigation whatever was conducted at the place of apprehending the accused. Search party had gone to bus stand on an information about narcotic drug being carried on the person of the offender. No panchnama was made of apprehending the accused at the alleged place where accused was apprehended. There is statement of Mr. Savalia, that it is requirement of law

that panchnama has to be prepared at the place where accused is apprehended. While Mr. Pastagia claims to be person who received information and went to spot along with other officers, suggesting that he apprehended the accused at Bus Stand, which is a public place, Mr. Savalia, states that accused was directed to him by V.R. Desai. He does not credit Mr. Pastagia with apprehending the accused. He also states that though Mr. Desai had come to his office with Mr. Pastagia, but Mr. Desai had said nothing about the incident to Mr. Savalia. These discrepancies with non framing of any panchnama at bus stand throws serious doubt about the existence of all necessary links in the chain to reach a finding about existence of all the conditions about a proper recovery of contraband article from the possession of the accused to raise presumption of guilt against him.

6. This doubt is created on the basis that unless they were sure of contraband being either on the person of the accused or in an article held by him in his hand, there was no question of his being whisked away in a jeep car in the manner that the officers did.

7. The evidence therefore, is not clear as to whether the search was started initially at Vadi Falia bus stand and concluded at the office of Customs Department or that it was done entirely at the customs office. Therefore in the cross examination of these witnesses in the trial court, the learned advocate for the accused has put in several questions on the point and which further strengthens the said situation of doubt.

8. In this background we have no hesitation in holding that it is quite obvious that neither the party which went to Vadi Falia bus stand and apprehended the accused nor the customs officer Shri Savalia at the office has made the accused aware of his right. It also appears from the record that the officers themselves were not conscious of the fact that the accused has his right under Section 50 and that he should be made aware of it. In this factual background also when these officers are themselves silent in their deposition mere fortuitous circumstances of the members of the raiding party or the investigation officer himself either or both being gazetted officers cannot come to the rescue of the prosecution so far as the requirement of Section 50 in the present case is concerned, particularly when the evidence is also silent on the point whether the officer apprehending the accused was authorised under Section 41 or 42.

9. With the result, we come to the conclusion that the point raised by learned advocate Shri Thacker as to compliance of Section 50 of the NDPS Act is accepted. The prosecution therefore fails and the appellant accused succeeds.

10. The appeal is allowed. The order of conviction is set aside. The accused is ordered to be set at liberty forthwith, if not required for any other purpose. Fine, if paid, is ordered to be refunded.

(devu)